

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Tony Mumfrey (b) County of Residence of First Listed Plaintiff <u>Jefferson</u> (EXCEPT IN U.S. PLAINTIFF CASES) (c) Attorney's (Firm Name, Address, and Telephone Number) John M. Morgan, Harris, Duesler & Hatfield, L.L.P., 550 Fannin, Suite 650, Beaumont, TX 77701, (409) 832-8382	DEFENDANTS CVS Pharmacy, Inc., Mike Cooney, Gary LeBlanc and Douglas Jenny County of Residence of First Listed Defendant <u>Rhode Island</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known) J. Bradley Spalding and Fazila Issa, Littler Mendelson, P.C., 1301 McKinney Street, Suite 1900, Houston, TX 77010, (713) 951-9400
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only) <div style="display: flex; justify-content: space-between;"> <div style="width:48%;"> <input type="checkbox"/> 1 U.S. Government Plaintiff </div> <div style="width:48%;"> <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width:48%;"> <input type="checkbox"/> 2 U.S. Government Defendant </div> <div style="width:48%;"> <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) </div> </div>	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) <table style="width:100%; border-collapse: collapse;"> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DEF</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DEF</th> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated <i>or</i> Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated <i>and</i> Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated <i>or</i> Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated <i>and</i> Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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CONTRACT		TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY		CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition				

V. ORIGIN (Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input checked="" type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332

Brief description of cause:
Discrimination and retaliation under Chapter 21 of the Texas Labor Code

VII. REQUESTED IN COMPLAINT:

<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ <u>> 75,000.00</u>	CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 3/2/10 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

TONY MUMFREY,

PLAINTIFF

VS.

**CVS PHARMACY, INC., MIKE COONEY,
GARY LeBLANC AND DOUGLAS JENNEY,**

DEFENDANTS.

§
§
§
§
§
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§
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§
§

NO. _____

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant CVS Pharmacy, Inc. ("CVS") files this Notice of Removal of the above-entitled action from the 58th Judicial District Court of Jefferson County, Texas to the United States District Court for the Eastern District of Texas, Beaumont Division. As set forth below, this case is subject to removal based upon diversity jurisdiction.

**I.
BACKGROUND**

1. On October 14, 2009, Plaintiff Tony Mumfrey ("Mumfrey") filed this civil action, Case No. A185,123, captioned *Tony Mumfrey v. CVS Pharmacy, Inc., Mike Cooney, Gary LeBlanc and Douglas Jenney*, in the 58th Judicial District Court of Jefferson County, Texas.

2. On October 19, 2009, Mumfrey served his Original Petition ("Original Petition") upon CVS's registered agent for service of process. Mumfrey also served his Original Petition upon Defendants Mike Cooney ("Cooney"), Gary LeBlanc ("LeBlanc"), and Douglas Jenny ("Jenny") on October 19, 2009. The Original Petition asserted a claim for unliquidated damages, and did not allege the amount of damages sought or an amount in controversy. On February 8,

2010, Mumfrey filed, and the Defendants were served, his First Amended Petition (“Amended Petition”) in which he pleaded, for the first time, a maximum amount of damages sought which is well in excess of the \$75,000 amount in controversy required to trigger diversity jurisdiction in this Court, the service of which permitted Defendants for the first time to ascertain that the case was removable based upon diversity jurisdiction. 28 U.S.C. § 1446(b). True and correct copies of all process, pleadings, and orders filed and served in the state court action and a certified copy of the state court docket sheet are attached hereto and incorporated herein by reference. Pursuant to Eastern District of Texas Local Rule CV-81, Exhibit A to this Notice of Removal is an Index of required documents, and the required documents are attached as Exhibits 1-6.

3. This case arises out of an employment dispute between Mumfrey, a pharmacist, and CVS, his former employer. In his Original Petition, Mumfrey alleges that CVS discriminated against him, denied him reasonable accommodations, and retaliated against him on the basis of a disability in violation of Chapter 21 of the Texas Labor Code (“Chapter 21”). However, in a transparent attempt to defeat diversity jurisdiction, Mumfrey also alleges baseless tortious inference, fraud, and defamation claims against three CVS managers, Cooney, LeBlanc, and Jenny. As explained below, Mumfrey fraudulently joined Cooney, LeBlanc, and Jenny because there is no possibility that Mumfrey will prevail on any of his state-law claims against them. Cooney, LeBlanc, and Jenny have provided their Consent to Removal contemporaneously with this Notice of Removal. (Exhibit B, Consents to Removal).

II. DIVERSITY JURISDICTION

4. This Court has diversity jurisdiction over this civil action under 28 U.S.C. § 1332, and, therefore, this action is removable under 28 U.S.C. § 1441(b). Diversity jurisdiction exists in a civil matter when the amount in controversy exceeds \$75,000, exclusive of interest and

costs, and the dispute is between citizens of different states. *Id.* § 1332(a)(1). Both of the requirements for subject matter jurisdiction based on diversity jurisdiction are met in this case.

A. The Amount in Controversy Exceeds \$75,000

5. The amount in controversy in this action exceeds \$75,000, exclusive of interest and costs. In his Amended Petition filed on February 8, 2010, Mumfrey seeks three million five hundred seventy-five thousand dollars (\$3,575,000) in damages plus attorneys' fees equivalent to 40% of the total gross recovery and appellate attorney's fees in the amount of \$100,000. (Plaintiff's Amended Petition at 4-5). Based on Mumfrey's Amended Petition, it is facially apparent, therefore, that the amount in controversy exceeds the jurisdictional requirement of \$75,000.

B. Diversity of Citizenship Exists

6. There is complete diversity between the parties. At the time of filing of Mumfrey's Original Petition and at the time of removal, Mumfrey was and is an individual citizen of Texas.

7. At the time of filing of Mumfrey's Original Petition and at the time of removal, CVS Pharmacy, Inc. was and is a citizen of Rhode Island, with both its state of incorporation and principal place of business in Rhode Island. *See* 28 U.S.C. § 1332(c) (discussing that a corporation is a citizen of the state in which it was incorporated and the state in which it has its principal place of business).

8. At the time of filing Mumfrey's Original Petition and at the time of removal, Defendants Cooney, LeBlanc, and Jenny were and are citizens of Texas.¹ However, their citizenship should be ignored for purposes of removal because, as discussed more fully below,

¹ In January 2009, shortly before Mumfrey's termination, LeBlanc was transferred by CVS to California; however,

Mumfrey fraudulently joined them for the sole purpose of defeating diversity jurisdiction.

III. FRAUDULENT CLAIMS

9. To establish that Mumfrey has fraudulently joined Cooney, LeBlanc, and Jenny, CVS must “show either that there is no possibility that [Mumfrey] would be able to establish a cause of action against [the individual Defendants] in state court or that there has been outright fraud in pleading the jurisdictional facts.” *Wodka v. Integrated Partnerships, Inc.*, No. 201CV1150-D, 2001 WL 1029460, at *1 (N.D. Tex. Aug. 24, 2001) (electronically published cases are attached as Exhibit D). In order to make this determination, a court may, if appropriate, pierce the pleadings to consider “summary judgment-type evidence” such as affidavits and deposition testimony. *See id.*; *see also Gipson v. Wal-Mart Stores, Inc.*, No. H-08-2307, 2008 WL 4844206, at *9 (S.D. Tex. Nov. 3, 2008) (Exhibit D).

A. Tortious Interference Claims

10. Mumfrey alleges that Cooney, LeBlanc, and Jenny tortiously interfered with his employment and business relations. In *Martin v. Kroger Co.*, No. 99-20989, 2000 WL 992237, at *3 (5th Cir. June 23, 2000), the Fifth Circuit made clear that “[Chapter 21] provides the exclusive state-law means for redress of employment discrimination and preempts claims for discrimination brought under other state-law theories.” (Exhibit D). In other words, if a plaintiff’s tortious interference claim is simply a “repackaging” of his discrimination and retaliation claims, it is barred by Chapter 21. *See id.*

11. To the extent that a tortious interference claim may stand on its own, a plaintiff must establish: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) interference that proximately caused damage; and (4) actual damage or loss. *Id.*

for purposes of citizenship, LeBlanc’s domicile is Texas. (See Exhibit C, LeBlanc Declaration ¶¶ 2-3).

If the plaintiff alleges that an agent of his current employer has interfered with his contract with that employer, then the plaintiff must establish that “the agent acted willfully and intentionally to serve the agent’s personal interests at the corporation’s expense.” *Id.*; *see also Wodka*, 2001 WL 1029460, at *2. “A corporate officer’s mixed motives—to benefit both himself and the corporation—are insufficient to establish liability.” *Martin*, 2000 WL 992237, at *3. In addition, “if a corporation does not complain about its agents actions, then the agent cannot be held to have acted contrary to the corporation’s interests.” *Id.*; *see also Wodka*, 2001 WL 1029460, at *2.

1. Mumfrey’s Original Petition Fails to State Tortious Interference Claims Against Cooney, LeBlanc, or Jenny

12. Mumfrey alleges that Cooney, LeBlanc, and Jenny tortiously interfered with his business relationship with CVS by “personally embark[ing] upon a pattern of retaliation” against him. (Plaintiff’s Original Petition at 3). The plain language of this allegation makes it clear that Mumfrey’s tortious interference claim is merely a repackaged version of his discrimination and retaliation claims against CVS. Accordingly, that claim is preempted by Chapter 21 and joinder of the individual Defendants is fraudulent. Further, in the absence of any allegations that Cooney, LeBlanc, and Jenny acted because of their own personal interests and that CVS expressed displeasure with their actions, Mumfrey’s tortious interference claim cannot stand on its own.

2. Mumfrey’s Deposition Testimony Confirms That There is No Possibility That Mumfrey Could Prevail on His Tortious Interference Claims Against the Individuals.

13. Any doubt as to whether Mumfrey’s tortious interference claim has independent merit is extinguished by virtue of his deposition testimony, in which Mumfrey admits that he has no idea of the basis for this claim:

Q. In what way has Mr. Cooney, Mr. Jenney, or Mr. LeBlanc tortiously interfered with your business relationships?

A. **You would have to ask the attorney that drafted this.**

* * *

Q. [Reading excerpts from Plaintiff's petition:] "Texas law recognizes that even in an employment-at-will situation, a supervisor can tortiously interfere with a plaintiff's business relationships. These defendants personally embarked upon a pattern of retaliation against this plaintiff, and such actions were not justified by either an absolute or qualified privilege."

A. **I don't know what half that means.**

Q. Does that mean that you believe that by retaliating against you and discriminating against you, that the individuals were also tortiously interfering with your employment with CVS?

A. Again, **I do not know what he means by this**; and I apologize that you can't ask him. I don't know what he's --

* * *

Q. Your lawsuit also alleges that the individual defendants tortiously interfered with your employment. Okay? Do you know anything about that or any facts which support that belief other than what we have already talked about in the context of discrimination and retaliation?

A. Is that what tortious -- tortious interference is?

Q. Do you not know what it is?

A. **I don't know what tortious interference is.**

(Exhibit E, Mumfrey Dep. at 233:19-23, 234:9-23, 235:18-236:2) (emphasis added). There is no possibility that Mumfrey could prevail with respect to his tortious interference claims against Cooney, LeBlanc, and Jenny. Accordingly, their joinder in this lawsuit is improper, and complete diversity is established to support removal.

B. Fraud Claims

14. To prevail on a fraud claim, a plaintiff must establish that: (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the defendant made the representation, he knew it was false or made the representation recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon the representation; (5) the plaintiff actually relied upon the representation; and (6) the plaintiff suffered an injury as a result. *Gipson*, 2008 WL

4844206, at *6. The failure to allege an underlying representation is fatal to establishing a fraud claim. *See id.* (finding fraudulent joinder and denying the plaintiff's motion to remand based on the fact that plaintiff failed to identify any representation by defendant).

1. Mumfrey's Original Petition Fails to State Fraud Claims Against Cooney, LeBlanc, or Jenny

15. Without alleging a single supporting fact, Mumfrey's Petition alleges that he "sues these Defendants . . . under the theory of constructive fraud." (Plaintiff's Original Petition at 3-4). This conclusory allegation fails to identify a requisite fact—a representation by Cooney, LeBlanc, or Jenny—to support Mumfrey's fraud claims.

2. Mumfrey's Deposition Testimony Confirms That There is No Possibility That Mumfrey Could Prevail on His Fraud Claims Against the Individual Defendants.

16. Given the dearth of facts in Mumfrey's Original Petition, it is not surprising that Mumfrey could not identify in his deposition a single material misrepresentation made by any of the Defendants:

- Q. Did Mr. Cooney, Mr. LeBlanc, or Mr. Jenney at any point make a representation to you that turned out to be false?
- A. What do you mean by "make a representation" to me?
- Q. Did they tell you anything that turned out to be false?
- A. **I can't think of anything.**

(Exhibit E, Mumfrey Dep. at 239:10-17) (emphasis added). As there is no possibility that Mumfrey could prevail with respect to his fraud claims against Cooney, LeBlanc, and Jenny, their joinder in this lawsuit is improper, and complete diversity is established to support removal.

C. Defamation Claims

17. To prevail on a defamation claim, a plaintiff must establish that: (1) the defendant published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with malice or negligence regarding the truth of the statement. *See Gipson*, 2008 WL

4844206, at *9. Defamation claims must state the *time* and *place* of publication, the *content* of the alleged defamatory statements, and the *identity of the third parties* to whom the alleged defamatory statements were made. *See id.* (denying motion to remand in response to a removal by the defendant because plaintiff failed to allege in his petition “the identity of the listener of the defamatory statements”); *Rawlings v. Travelers Property Casualty Ins. Co.*, No. 3:07-CV-1608-O, 2008 WL 2115606, at *7 (N.D. Tex. May 20, 2008) (denying motion to remand because petition did not “identify the content or character of any specific defamatory statements or the time or place of such statements” and because plaintiff failed to allege that the statements were published to a third party) (Exhibit D); *Lowery v. Allstate County Mut. Ins. Co.*, No. 3:06-CV-1886-L, 2007 U.S. Dist. LEXIS 30061, at *12-14 (N.D. Tex. Apr. 23, 2007) (noting that statements made to other employees do not constitute publication to a third party) (Exhibit D).

1. Mumfrey’s Original Petition Fails to State Defamation Claims Against Cooney, LeBlanc, or Jenny.

18. Mumfrey’s Petition devotes only one sentence to his defamation claims, as follows:

Upon information and belief, Plaintiff asserts that these individual Defendants also engaged in a pattern of slander and defamation per se against Plaintiff to other employees and/or officers of CVS, and these actions did not occur within the bounds of either an absolute or qualified privilege.

(Plaintiff’s Original Petition at 3). Without any supporting facts as to when, where, or to whom Cooney, LeBlanc, or Jenny made the alleged defamatory statements, or the content of those statements, the bare bone allegations pleaded in Mumfrey’s Petition fail to state viable defamation claims.

2. Mumfrey's Deposition Testimony Confirms That There is No Possibility That Mumfrey Could Prevail on His Defamation Claims Against the Individual Defendants.

19. Even if this Court pierces the pleadings to consider summary judgment-type evidence, Mumfrey's deposition testimony unequivocally demonstrates that he cannot establish his defamation claim. In his deposition, Mumfrey essentially testified that CVS defamed him by issuing written disciplinary reprimands which led to his termination and subsequently classifying him as "ineligible for re-hire" upon his termination. However, Mumfrey admitted that: (1) he knows of nobody other than himself who was provided that information by CVS; and (2) that he is unaware of Cooney, LeBlanc, or Jenny ever publishing that information, or any other alleged defamatory statements. In fact, according to Mumfrey, he is aware only of one prospective employer who attempted to contact the CVS help desk for an employment reference, and that entity never received a return call. (Exhibit E, Mumfrey Dep. at 236:3-238:2). Because there is no possibility that Mumfrey could prevail with respect to his defamation claims against Cooney, LeBlanc, and Jenny, their joinder in this lawsuit is improper, and complete diversity is established to support removal.

**IV.
PROCEDURAL ALLEGATIONS**

20. The Eastern District of Texas, Beaumont Division, is the federal district and division that encompasses the 58th Judicial District Court of Jefferson County, Texas. *See* 28 U.S.C. § 124(c)(2).

21. Although the Plaintiff's Original Petition was served on October 19, 2009, the action was not removable at that time as the Plaintiff had not pleaded the amount of damages sought and there was no opportunity to discern an amount in controversy. However, Mumfrey's Amended Petition, in which he sought damages well in excess of the \$75,000 amount in

controversy necessary to implicate this Court's diversity jurisdiction, was served on Defendants on February 8, 2010. This notice of removal is therefore filed within thirty days of the first point at which it could have been ascertained that the action was removable, and is therefore timely filed under 28 U.S.C. § 1446. Therefore, removal to this Court is proper under 28 U.S.C. §§ 1441(a) and (b) and 1446.

22. CVS has simultaneously given prompt written notice of the filing of its Notice of Removal to all adverse parties and filed a copy of the Notice of Removal with the 58th Judicial District Court of Jefferson County, Texas, attached hereto and incorporated herein by reference as Exhibit F. *See* 28 U.S.C. § 1446(d).

WHEREFORE, CVS respectfully requests that this action be removed from the 58th Judicial District Court of Jefferson County, Texas to the United States District Court for the Eastern District of Texas, Beaumont Division.

Dated March 2, 2010

Respectfully submitted,

/s/ J. Bradley Spalding

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CERTIFICATE OF SERVICE

I hereby certify that, on March 2, 2010, a true and correct copy of the foregoing document was sent by certified mail, return receipt requested, to the following counsel of record:

John M. Morgan
HARRIS, DUESLER & HATFIELD, L.L.P.
550 Fannin, Suite 650
Beaumont, Texas 77701

ATTORNEY FOR PLAINTIFF

/s/ Fazila Issa
Fazila Issa

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